In the Supreme Court of the United States

October Term, 1978

No. 78-1099

Supreme Court, U. S.
FILED
JAN 8 1979
MICHAEL RODAK, JR., CLERK

J. MARQUEZ, Superintendent,

Petitioner,

v.

LAWRENCE S. BITTAKER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. _____

J. MARQUEZ,
Superintendent,

Petitioner,

v.

LAWRENCE S. BITTAKER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner J. MARQUEZ, Superintendent[1] of the California Correctional Institute at Tehachapi, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this habeas corpus action on August 3, 1978, a petition for rehearing having been denied on December 6, 1978.

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[1]Although J.J. Enomoto was superintendent in the course of the lower federal court proceedings, the present superintendent is J. Marquez.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit granting habeas corpus relief appears as Appendix A to this petition. A copy of the Ninth Circuit's order denying the petition for rehearing appears as Appendix B to this petition. The order of the United States District Court dated March 6, 1974, initially granting the petition for writ of habeas corpus, appears as Appendix C to this petition. The order of the United States District Court, Central District of California, vacating judgment dated March 19, 1974 is attached hereto as Appendix D to this petition. The order of the United States District Court, Central District of California, dated September 4, 1975, granting the petition for writ of habeas corpus is attached as Appendix E to this petition.

Opinions arising out of state proceedings are as follows: The California Court of Appeal opinion dated July 25, 1972, affirming the burglary conviction is attached as Appendix F. The Court of Appeal order dated August 1, 1972, denying rehearing without opinion is attached as Appendix G. The California Supreme Court order of September 20, 1972, denying hearing without opinion is attached as Appendix H. The order of this Honorable Court denying certiorari as to the state proceedings without opinion dated February 20, 1973, is attached as Appendix I.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was filed on August 3, 1978. A timely petition for rehearing along with a suggestion for rehearing en banc was filed on August 14, 1978, the rehearing being denied by the Ninth Circuit and the suggestion for

rehearing en banc being rejected by the Ninth Circuit on December 6, 1978. This petition for a writ of certiorari is filed within 90 days of that date and therefore timely filed. (*United States v. Healy* (1964) 376 U.S. 75, 77-80, and cases cited.) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a lower federal court may impose an interpretation of a federal constitutional issue on a state court when the state court's interpretation of that issue differs from that of the particular federal court and the United States Supreme Court has not yet spoken on that issue?

2. Whether the doctrine announced in *Faretta v. California* (1975) 422 U.S. 806, setting forth a federal constitutional right of self-representation should be applied retroactively?

3. Whether the denial of self-representation should be subject to a harmless error rule?

STATUTORY PROVISIONS INVOLVED

Article III, section 1 of the United States Constitution reads:

> "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and Inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

The Sixth Amendment to the United States Constitution reads:

> "In all criminal prosecutions, the accused shall enjoy a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Tenth Amendment to the United States Constitution reads:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People."

STATEMENT OF THE CASE

Petitioner J. MARQUEZ, Superintendent, seeks a writ of certiorari to have this Court review the decision of the United States Court of Appeals for the Ninth Circuit affirming the grant of a conditional writ of habeas corpus.

As noted in the Ninth Circuit opinion (Appendix A), the case involved one Lawrence S. Bittaker, who was convicted in the California court on a charge of burglary some four years before the decision of *Faretta v. California supra,* 422 U.S. 806, which sets forth a constitutional right of self-representation in a criminal prosecution. Bittaker, hereinafter referred to as respondent, "brought habeas corpus before *Faretta*" (Appendix A, p. 20). Respondent had appealed his conviction of burglary to the California Court of Appeal, which affirmed his conviction

on July 25, 1972, holding that his denial of self-representation was harmless as it was not a Federal constitutional right. (Appendix F, pp. 39-44.) The Court of Appeal denied rehearing on August 1, 1972, and the California Supreme Court denied hearing on September 20, 1972. (Appendix G and H.) On February 20, 1973, this Honorable Court denied certiorari. (Appendix I.) It was not until June 30, 1975, that this Honorable Court for the first time recognized a constitutional right of self-representation in *Faretta v. California* (1975) 422 U.S. 806.

Respondent had sought relief in the United States District Court, Central District of California, on the grounds that he was denied the opportunity to represent himself in the above criminal action. The United States District Court, in an order dated March 6, 1974, conditionally granted a petition for writ of habeas corpus concurring in and adopting the findings and conclusions of the report and recommendations of the United States Magistrate who had applied the Ninth Circuit standards regarding self-representation to California state convictions by means of habeas corpus. (Appendix C, pp. 29, 30.)

However, on March 19, 1974, the United States District Court for the Central District of California issued an order vacating its judgment. (Appendix D.) On September 4, 1975, the United States District Court, Central District of California, issued an order conditionally granting the petition for writ of habeas corpus in light of *Faretta v. California supra,* 422 U.S. 806. (Appendix E.) Petitioner appealed to the Ninth Circuit (Appendix A, p. 20). The Ninth Circuit affirmed the granting of the petition for writ of habeas corpus stating that the court would not have to reach the issue of the retroactivity of the *Faretta* doctrine because the law of the circuit at the time of respondent's state court trial provided for a constitutional

right of self-representation. (Appendix A, pp. 20, 21.) Thus, the court held that even though the California courts had denied there was a right of self-representation before *Faretta* (*People v. Sharp* 7 Cal.3d 448, 103 Cal. Rptr. 233, 499 P.2d 489, *cert. denied* (1973) 410 U.S. 944), the Ninth Circuit rule setting forth a constitutional right of self-representation was to be applied to California judgments. (Appendix A, pp. 20, 21.) The opinion of the Ninth Circuit recognized that the conceptual basis of the Ninth Circuit ruling regarding self-representation was that of a counterpart to the right of counsel which was different than that of *Faretta,* which found the right of self-representation implied in the structure of the Sixth Amendment. (Appendix A, pp. 21, 22.) The court held even though there was a conceptual difference between the Ninth Circuit rule regarding self-representation and *Faretta*, that the rule of that circuit was still binding on California judgments before the *Faretta* opinion came down, in effect describing the conceptual difference as a "verbal minuet." (Appendix A, p. 22.) The opinion also held that the harmless error rule could never be applied to *Faretta* error. (Appendix A, p. 22.)

Furthermore, the decision of the Ninth Circuit overruled a United States Court, Central District of California, decision which held *Faretta* not to be retroactive, namely, *Houston v. Nelson* (C.D. Cal. 1975) 404 F.Supp. 1108, 1115. (Appendix A, p. 21 fn.1.) Additionally, the opinion of the Circuit Court criticized petitioner's argument on the issue of retroactivity to the effect that one of the California prisoners who may benefit from the *Faretta* decision was Charles Manson. (Appendix A, p. 22 fn.2.) Thus the Ninth Circuit affirmed the granting of the petition for writ of habeas corpus to an individual who had requested self-representation and who had been convicted some four

years before the *Faretta* decision came down; also, the Ninth Circuit denied a timely petition for rehearing by the State of California and rejected a timely suggestion for rehearing en banc on December 6, 1978.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

I

A FEDERAL COURT OF ONE CIRCUIT MAY NOT IMPOSE A FEDERAL CONSTITUTIONAL INTERPRETATION ON A STATE JUDGMENT IN GRANTING HABEAS CORPUS RELIEF WHERE THE COURTS OF THAT STATE HAVE A CONTRARY INTERPRETATION AND THIS HONORABLE COURT HAS NEVER RULED ON THE ISSUE

The Court of Appeals for the Ninth Circuit in its opinion has imposed an interpretation, contrary to that of the California Supreme Court, of a federal constitutional issue on a final judgment rendered by the State Courts of California. The issue before the Ninth Circuit was the retroactivity or nonretroactivity of the doctrine set forth for the first time by the United States Supreme Court in *Faretta v. California* (1975) 422 U.S. 806, namely, that a defendant had a right of self-representation under the Sixth Amendment of the Federal Constitution. However, instead of the court reaching that important issue which was briefed by the parties, it determined that, " . . . it is not necessary to reach that question because the law of this Circuit at the time of Bittaker's state court trial had already been established in a fashion consistent with the Supreme

Court's statement of the law in Faretta . . . " (Citations omitted; Appendix A, p. 20.)

Before *Faretta,* California held specifically that there was no federal constitutional right to self-representation in *People v. Sharp* 7 Cal.3d 448, 103 Cal. Rptr. 233, 499 P.2d 489, *cert. denied* (1973) 410 U.S. 944. Before *Faretta,* the Ninth circuit held there was a constitutional right to self-representation in *Arnold v. United States* (9th Cir. 1969) 414 F.2d 1056, 1058, *cert. denied* (1970) 396 U.S. 1021, based upon the theory that self-representation was based upon a correlative right to that of counsel, a theory specifically rejected in the *Faretta* decision.[2] (*Faretta v. California supra,* 422 U.S. 806, 819, 820 fn.15.) California held *Faretta* not to be retroactive in *People v. McDaniel* 16 Cal.3d 156, 127 Cal. Rptr. 467, 545 P.2d 843, *cert. denied* (1976) 429 U.S. 847.

The issue now raised is whether or not a federal court of one circuit can impose a federal constitutional interpretation on a state judgment by means of habeas corpus even though the courts of that state have a contrary constitutional interpretation, and this Honorable Court has not yet decided the issue. The policy consideration is made manifest by Article III, section 1, of the United States Constitution itself which gives this Honorable Court independent existence by reason of constitutional man-

[2]In this regard, it should be noted that the Ninth Circuit in a pre-*Faretta* decision, *Meeks v. Craven* (9th Cir. 1973) 482 F.2d 465, 467, cited the *Sharp* decision for the proposition that a trial judge should not be presented with the impossible situation of the conflict between the right of counsel and self-representation. Judge Trask in a concurring opinion described the difference in the California *Sharp* rule and the Ninth Circuit's rule regarding the constitutional status of self-representation as being "partially semantic." (*Meeks v. Craven supra,* at pp. 468-469.)

date but which also makes the lower federal courts creations of Congress. This is a key issue involving the delicate relationship between federal and state courts which is grounds alone to grant the within petition. (*Wichita Co. v. City Bank* (1939) 306 U.S. 103, 106-107.)

The effect of the opinion of the Ninth Circuit has thrust upon California for the first time pre-1975 standards of that circuit of self-representation which in effect were not defined as equivalent to the rights under *Faretta* until the opinion of the Court of Appeals in this case. Such a method of analysis is contrary to the body of law which had existed in California regarding the nature of self-representation and retroactivity and instead imposes retroactivity for the first time on a new standard disruptive of the criminal justice system of California. Furthermore, it does so by the mechanics of the application of Ninth Circuit pre-*Faretta* law to state judgments for the first time over three years after *Faretta* was decided. Thus not only has the Ninth Circuit imposed its pre-*Faretta* standards on California judgments, it has also done so for the very first time years after the *Faretta* decision was rendered. (Appendix A, p. 20.)

The foregoing interpretation of the right to self-representation greatly impedes the concept of comity contrary to the policy set forth by this Court in *Younger v. Harris* (1971) 401 U.S. 37, 53. This analysis precludes California from litigating the central issue of retroactivity of the *Faretta* decision while in effect imposing the standards of *Faretta* retroactively. The policy favoring finality of judgment is impeded, because final convictions, such as the one in this case, in which review had even been sought and denied by this Honorable Court, can be swept aside years later by differing lower Federal court constitutional

interpretations. The question is clearly raised as to whether or not the judgment of California or other states may be set aside by interpretations of the Federal Constitution by lower federal courts of one circuit when the United States Supreme Court has not spoken on the issue. An important policy is uniformity of decisions among the circuits. The opinion of the Ninth Circuit in this case in effect binds the California courts to its interpretation of the Federal Constitution, regardless of whether or not California decisional law is to the contrary. This effect comes about because the California federal constitutional interpretations are of no real binding accord if state judgments can be mechanically set aside by means of federal habeas corpus because of a different interpretation by the Ninth Circuit.

It has been held in other jurisdictions that state courts are not bound by the decisions of lower federal courts regarding the interpretation of federal constitutional issues. (*United States ex rel. Lawrence v. Woods* (7th Cir. 1970) 432 F.2d 1072, 1075-1076, *cert. denied* (1971) 402 U.S. 983; *Owsley v. Peyton* (4th Cir. 1965) 352 F.2d 804, 805; *People v. Bradley* 1 Cal.3d 80, 86, 81 Cal. Rptr. 457, 460 P.2d 129.) Note especially the discussion delineating the conflict among state courts in 20 Am. Jur. 2d Courts § 230, p. 560; *see also* 21 C.J.S., Courts § 206, pp. 377-378; *Ruck v. Chicago M&ST Ry. Co.* (1913) 153 Wis. 158, 140 N.W. 1074, 1076 (holding that state courts can never be bound by lower federal court decisions when they are in conflict).) The fact that the decision of the Ninth Circuit is in conflict with foregoing cited opinions on this most crucial issue is a ground in and of itself for the granting of certiorari in this case. (*Buffalo Forge Co. v. Steelworkers* (1976) 428 U.S. 397, 404; *Davis v. United States* (1973) 411 U.S. 233, 236; *United States v. Dionisio* (1972) 410 U.S. 1, 5.)

In the recent opinions of this Court, there has been a strong trend to minimize the interference of federal courts in state proceedings. (*Wainwright v. Sykes* (1977) 433 U.S. 72, 87; *Stone v. Powell* (1976) 428 U.S. 465, 481, 482, 494; *Francis v. Henderson* (1976) 425 U.S. 536, 541, 542.) In the *Wainwright* and *Francis* decisions, this Court held that a defendant must follow state procedural rules in making proper objections in order to raise federal issues under federal habeas corpus. In *Stone v. Powell supra,* 428 U.S. 465, 481, 482, 494, this Court held that if the state provides opportunities for full and fair litigation of the Fourth Amendment rights, then there is no necessity for federal habeas corpus relief. This should be especially true when the "right" accorded by a lower Federal court does not go to guilt or innocence but rather is an attempted vindication of unrelated policies whether it be the exclusionary rule or self determination by means of self-representation.[3]

In the same manner, it is urged that, when state courts provide opportunity for full and fair litigation of federal issues, the interpretation of the state courts on those federal issues should be binding on that particular state without lower federal court interference even if the lower federal courts' interpretations of federal constitutional issues are different from that of the state courts. Rather, a state court should only be bound by a federal court interpretation of constitutional law when that court is the United States Supreme Court. Federal habeas corpus would still vindicate constitutional rights in state judg-

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[3]In the same regard the issue of self-representation should never, by reason of comity, be cognizable on Federal habeas corpus where the state provides opportunities for full and fair litigation of the issue since it (self-representation) does not go to the issue of guilt and innocence. (*See Stone v. Powell supra,* 428 U.S. 465, 481, 482.)

ments only when these rights have already been recognized by this Honorable Court. However, habeas corpus would not apply to rights recognized only by lower federal courts, especially when in conflict with state courts. To do otherwise would allow the individual circuits to impose their interpretation of federal matters upon the states within their jurisdiction even though those circuits themselves may be in conflict. This would mean that the conflicting circuits could cause disparate interpretations among their various jurisdictions so that a state may be forced to follow an incorrect interpretation of federal law not yet ruled upon by this Honorable Court. This could be true in spite of an individual state court's interpretation to the contrary. Rather, in the interest of comity and to allow states to fulfill their own destinies, no lower federal court interpretations of constitutional law should be binding on the state court in the absence of any United States Supreme Court decision on that point. Thus the policy enunciated in the Tenth Amendment to the Federal Constitution relative to delegating powers not enunciated in the Consitution to the states would be fulfilled.

The Ninth Circuit accurately, in its opinion, notes that it had never before applied self-representation to state habeas corpus petitioners. (Appendix A, p. 20.) Thus the Court of Appeals is forcing upon California its prior decisions arising out of federal prosecutions to which the state was never a party litigant. Nevertheless the State would be in effect bound by their pronouncements on self-representation though contrary to California Supreme Court rulings. Lower federal courts should not be able to affect state judgments when the state has not been given the opportunity to litigate important constitutional interpretations.

What is especially problematic in this case, is that the conceptual underpinnings of self-representation in the Ninth Circuit, the "correlative right to counsel theory," was, as stated before, rejected expressly in *Faretta v. California supra,* at p. 820 fn.15, which found the right in the structure of the Sixth Amendment itself. Yet the Court of Appeals applies its pre-*Faretta* holding of law to California judgments, in effect describing the admittedly disparate conceptual bases as a "verbal minuet." (Appendix A, p. 22.)

In this regard it should be noted that the Eighth Circuit in *United States v. Warner* (8th Cir. 1970) 428 F.2d 730, 733, *cert. denied* (1970) 400 U.S. 930, held the right to self-representation to be of constitutional dimension, although they had prior in *Butler v. United States* (8th Cir. 1963) 317 F.2d 249, 258, *cert. denied* (1963) 375 U.S. 838, held that such a right was purely statutory. Yet even in light of the *Warner* decision, the Eighth Circuit refused to hold the *Faretta* decision retroactive to the state courts in *Martin v. Wyrick* (8th Cir. 1978) 568 F.2d 583, wherein this Court denied certiorari in (1978) 435 U.S. 975.

Of interest is the fact that the Eighth Circuit in *Martin* held *Faretta* not retroactive citing as its authority the California Supreme Court case of *People v. McDaniel supra,* 16 Cal.3d 156, 127 Cal. Rtpr. 467, 545 P.2d 843, *cert. denied* (1976) 429 U.S. 847, which case also held that the *Faretta* doctrine should not be applied retroactively. (*Martin v. Wyrick supra,* at p. 587.) Furthermore, the *Martin* court cited *Houston v. Nelson* (C.D. Cal. 1975) 404 F.Supp. 1108, 1115, a district court opinion in the Ninth Circuit jurisdiction holding *Faretta* non-retroactive. (*Martin v. Wyrick supra,* at p. 588.) The Ninth Circuit undertook to overrule the *Houston* decision in

their opinion. (Appendix A, p. 21 fn.1.)

As such, the rule set forth in the Ninth Circuit before *Faretta* should not now be held operable to California judgments and be a means of Federal habeas relief.

II

THE DOCTRINE OF A CONSTITUTIONALLY BASED RIGHT OF SELF-REPRESENTATION FIRST ENUNCIATED BY THIS COURT IN *FARETTA V. CALIFORNIA SUPRA,* (1975) 422 U.S. 806, SHOULD NOT BE APPLIED RETROACTIVELY

It is strongly urged that certiorari should be granted to determine the issue of whether or not the doctrine of a Federal constitutional right to self-representation announced for the first time by this Court in *Faretta v. California supra,* should be applied retroactively to the date of its rendition, June 30, 1975.

There is a strong split of authority on this most crucial point. California, in *People v. McDaniel supra,* 16 Cal.3d 156, 127 Cal. Rptr. 467, 545 P.2d 843, *cert. denied* (1976) 429 U.S. 847; Florida, in *Scott v. State* (Fla.App. 1977) 345 So.2d 414, 417; and the Eighth Circuit in *Martin v. Wyrick supra,* (8th Cir. 1978) 568 F.2d 583, 587, have held that the doctrine announced in *Faretta* should not be held retroactively.

On the other hand, the Supreme Court of Michigan in *People v. Holcomb* (1975) 395 Mich. 326, 235 N.W.2d 343, 347, fn.7, and the Texas court in *Landers v. Texas* 550 S.W.2d 272, 275 (Tex. Cir. App. 1977) held the *Faretta* doctrine to be retroactive; the Fifth Circuit in *Chapman v. United States* (5th Cir. 1977) 553 F.2d 886, 889, 890, held the *Faretta* doctrine to be retroactive to the

federal courts; and now the Ninth Circuit in this decision has held the doctrine of self-representation to be applied retroactively to the date of *Faretta*, basing it upon the prior decisions of the Ninth Circuit. Such an important issue should be grounds for the granting of certiorari. (*Buffalo Forge Co. v. Steelworkers supra,* (1976) 428 U.S. 397, 404; *Davis v. United States supra,* (1973) 411 U.S. 233, 236; *United States v. Dionisio supra* (1972) 410 U.S. 1, 5.)

It is urged that the decision in *Faretta* itself should be sufficient grounds for nonretroactive application. Justice Stewart writing for the majority noted that the question of whether or not there was a constitutional right to self-representation was, "not an easy question." (*Faretta v. California supra,* 422 U.S. 806, 807.) In addition, Justice Stewart aptly stated at pages 832 and 833 of the *Faretta* decision:

> "There can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel. For it is surely true that the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial. And a strong argument can surely be made that the whole thrust of those decisions may inevitably lead to the conclusion that a State may constitutionally impose a lawyer upon even an unwilling defendant." (Citations and footnote omitted.)

Of equal importance is the fact that the *Faretta* decision was not a unanimous opinion but had three dissenting

votes, those being of Chief Justice Burger, Justice Blackmun and Justice Rehnquist. Furthermore, Justice Blackmun, at page 852 of his dissenting opinion, listed close to a whole page of questions that would have to be answered for the first time because of *Faretta's* holding that there was a federal constitutional right of self-representation.

In addition, the three-prong criteria of, "(1) the purpose of the new rule; (2) the extent of reliance upon the old rule; and (3) the effect retroactive application would have upon the administration of justice" would mandate nonretroactive application of the *Faretta* decision. (*See Halliday v. United States* (1969) 394 U.S. 831, 832.)

The purpose of the rule in *Faretta* was not to enhance the reliability of the truth determining or fact finding process but instead was an attempt to vindicate self-determination. In addition, the decision in *Faretta* was the first time that this Court for almost two centuries had taken any firm position on the question of self-representation so that California could justifiably rely on its own constitutional decisional law albeit contrary to the decision later announced in *Faretta.*

Thirdly, the effect of the administration of justice in California could potentially be catastrophic. Recent cases in addition to those included on a list in the appendix of the Brief for the Petitioner in the *Faretta* case, reflect California's reliance on the old rule and involve some very lengthy murder trials. For example, it should be noted that *Faretta* was not held to be retroactive in answer to Charles Manson's contentions that he was denied the right to represent himself in both of his appeals arising out of his convictions for the Tate-LaBianca murders in *People v. Manson* 61 Cal. App.3d 102, 172, 132 Cal. Rptr. 265, 317, *cert. denied* (1977) 430 U.S. 986, and those

involving the Hinman-Shea murders in *People v. Manson* 71 Cal. App.3d 1, 50, 139 Cal. Rptr. 275, 302, 303, *cert. denied* (1978) 435 U.S. 953.

In footnote two of its opinion, (Appendix A, p. 22) the Court of Appeals criticizes the State for mentioning several times that one of the prisoners who may benefit from the *Faretta* decision is Charles Manson. However, the state under the three-prong retroactivity test must discuss the effect retroactive application would have upon the administration of justice within its borders. The fact that Charles Manson and others (whether notorious or not) could possibly benefit if there is retroactive application of the *Faretta* rule is of legitimate concern to the State of California as regards the effect retroactivity would have upon the administration of justice within its borders.

As such, certiorari should be granted on this major issue.

III
THE DENIAL OF SELF-REPRESENTATION SHOULD BE SUBJECT TO A HARMLESS ERROR RULE

The Court of Appeals, for the Ninth Circuit, held that error under *Faretta* could never be harmless even though they concede that, " . . . Some defendants may be able to show prejudice from the assistance of unwanted counsel . . ." (Appendix A, p. 22.) It has been held there is no showing of prejudice by reason of the denial of self-representation. (*See United States v. Abbamonte* (2nd Cir. 1965) 348 F.2d 700, 704.) In *Faretta* Justice Stewart did comment, "It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts."

(*Faretta v. California supra*, 422 U.S. at p. 836.) In fact Justice Blackmun at page 852 of his dissent notes that one of the questions that must be answered is, "May a violation of the right to self-representation ever be harmless error?"

In fact the California intermediate appellate courts are divided on the issue of whether or not denial of self-representation can ever be harmless error. (*See People v. Manson supra,* 71 Cal. App.3d 1, 50, 139 Cal. Rptr. 275, 303; and *People v. Manson supra,* 61 Cal. App.3d 102, 172, 132 Cal. Rptr. 265, 317, implying that the harmless error rule can exist in the case of self-representation, and to the contrary *see People v. Tyner* (1978) 76 Cal. App.3d 352, 355, 143 Cal. Rptr. 52, 53, 54; *People v. Freeman* (1977) 76 Cal. App.3d 302, 308, 142 Cal. Rptr. 806, 809, 810; and *Curry v. Superior Court* (1977) 75 Cal. App.3d 221, 229, 141 Cal. Rptr. 884, 888, 889.

As such, it is urged that the harmless error rule should be applicable to *Faretta* error.

CONCLUSION

For the foregoing reasons, petitioner submits that a writ of certiorari should issue and review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General of the State of California
JACK R. WINKLER, Chief Assistant,
Attorney General — Criminal Division
S. CLARK MOORE,
Assistant Attorney General
NORMAN H. SOKOLOW,
Deputy Attorney General
DONALD F. ROESCHKE,
Deputy Attorney General
HOWARD J. SCHWAB,
Deputy Attorney General

Attorneys for Petitioner

APPENDIX

United States Court of Appeals for the Ninth Circuit

LAWRENCE S. BITTAKER,
Petitioner-Appellee,

v.

J.J. ENOMOTO,
Respondent-Appellant.

No. 75-3419

OPINION

Appeal from the United States District Court for the Central District of California

Before: MERRILL, GOODWIN and TANG, Circuit Judges

GOODWIN, Circuit Judge:

Lawrence S. Bittaker was convicted in a California Court on a charge of burglary some four years before *Faretta v. California*, 422 U.S. 806 (1975), confirmed to defendants in state prosecutions the constitutional right of self-representation earlier recognized in federal courts.

APPENDIX A

Bittaker brought habeas corpus before *Faretta.* The district court held after *Faretta* that the state's denial of Bittaker's right of self-representation was a federal constitutional defect requiring the setting aside of his state conviction. The state appeals; we affirm.

While the parties have briefed and argued the case in terms of the "retroactivity" of *Faretta*, it is not necessary to reach that question because the law of this circuit at the time of Bittaker's state court trial had already been established in a fashion consistent with the Supreme Court's statement of the law in *Faretta. Arnold v. United States,* 414 F.2d 1056, 1058 (9th Cir. 1969), *cert. denied*, 396 U.S. 1021 (1970); *Bayless v. United States,* 381 F.2d 67, 71 (9th Cir. 1967). This circuit had stated in federal cases that self-representation was a corollary of the Sixth Amendment right to counsel. Because the defendant could waive his Sixth amendment right, we said he could also insist on self-representation as a constitutional, as well as a statutory, right. Until now, we have had no occasion to apply the federal constitutional right to state habeas petitioners. The Second Circuit, however, had done so. *United States ex rel. Maldonado v. Denno,* 348 F.2d 12, 15 (2d Cir. 1965). We avoided the question in *Meeks v. Craven,* 482 F.2d 465, 466 (9th Cir. 1973), because the petitioner's assertion of the right was inadequate.

There can be little doubt, however, that, if squarely faced with the issue, we would have applied the right to self-representation to a state habeas petitioner.

We had already characterized the right as a constitutional one in *Arnold v. United States,* 414 F.2d at 1058. The Supreme Court had previously applied virtually the entire Sixth Amendment to the states. *Duncan v. Louisiana,* 391 U.S. 145, 148 (1968); *Gideon v. Wainwright,*

372 U.S. 335 (1963). Accordingly there was no obvious reason to refuse to apply the implied Sixth Amendment right to self-representation as well.[1] We therefore agree with the district court that Bittaker would have been entitled to habeas relief had he sought it under the pre-*Faretta* law of this circuit.

The state emphasizes that *Faretta* has somewhat different conceptual basis from our prior holdings. The Supreme Court held that the right to self-representation is implied in the structure of the Sixth Amendment. We had expressed it as a counterpart to the right to counsel.

According to the state, the conceptual distinction makes our previous cases irrelevant. We disagree. Before *Faretta* a state defendant in this circuit had a federal constitutional right to self-representation. After *Faretta* the right was the same, whether or not its rationale was expressed in the same terms. The state would have us tell Bittaker that even though he had the same right before *Faretta* as prisoners in other circuits have since, we must refuse relief because the Supreme Court used different words than we had used in

---

[1]Before *Faretta,* California courts denied that there was such a right. *People v. Sharp,* 7 Cal.3d 448, 499 P.2d 489, 103 Cal. Rptr. 233, *cert. denied* 410 U.S. 944 (1973). A district court used this fact to deny habeas relief in Houston v. Nelson, 404 F. Supp. 1108, 1115 (C.D. Cal. 1975). The district court noted that before Faretta the Ninth Circuit and California had different rules, and it therefore applied the California standard to a state habeas petitioner. This decision was never reviewed by this court. Federal courts must apply federal constitutional law in cases properly before them under the federal habeas statute. Sesser v. Gunn, 529 F.2d 932, 934-35 (9th Cir. 1976). It is thus a district court's duty to apply the law of the appropriate circuit to all persons presenting claims within its jurisdiction. State interpretations of the federal constitution and laws are persuasive authority, but a district court may consider them on federal questions only if the question is otherwise open.

justifying that right. We will not engage in such a verbal minuet.

Finally, the state argues that we should apply the harmless-error doctrine to denials of the right of self-representation.[2] Again, we disagree.

Before *Faretta* we had held that the defendant need not show prejudice resulting from the denial of the right. *United States v. Price,* 474 F.2d 1223, 1227 (9th Cir. 1973). The Supreme Court vacated the judgment in *Faretta* without considering possible prejudice to the defendant. 422 U.S. at 836. Indeed, it noted that in most cases a defendant's case will suffer if he or she asserts the right. 422 U.S. at 834. Some defendants may be able to show prejudice from the assistance of unwanted counsel, but we will not speculate on the volume of such cases. To require such a showing could make the right to conduct one's own defense virtually unenforceable on appeal in the majority of cases.

The purpose of the right is to protect the defendant's personal autonomy, not to promote the convenience or efficiency of the trial. 422 U.S. at 834. Thus, a denial of the right automatically prejudices the defendant's freedom interest. More is unnecessary. We do not reach other arguments urged in support of the judgment below.

Affirmed.

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[2]The state mentions several times that one of its prisoners who may benefit from the *Faretta* decision is Charles Manson. We do not encourage this type of advocacy. A federal court must make its decisions in accord with the Consititution and the laws, without regard to the notoriety of parties or non-parties.

United States Court of Appeals for the Ninth Circuit

LAWRENCE S. BITTAKER,

Appellee,

v.

J.J. ENOMOTO,
Superintendent,

Appellant.

No. 75-3419
ORDER

Appeal from the United States District Court for the Central District of California

Before: MERRILL, GOODWIN, and TANG, Circuit Judges.

On August 14, 1978, appellant filed its petition for rehearing and suggestion for rehearing en banc.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

APPENDIX B

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

United States District Court
Central District of California

LAWRENCE S. BITTAKER,

Petitioner,

v.

J.J. ENOMOTO,
Superintendent,

Respondent.

Civil No. 73-1021-RJK(T)
ORDER CONDITIONALLY GRANTING PETITION FOR WRIT OF HABEAS CORPUS

Pursuants to 28 U.S.C. § 636(b)(3), attached is the report and recommendation of the United States Magistrate who has reviewed the petition filed herein for issuance of a writ of habeas corpus.

The Court has reviewed the petition and the attached report and recommendation, and concurs with and adopts the findings and conclusions of the Magistrate.

APPENDIX C

IT IS ADJUDGED as follows:

1. The petitioner was convicted in violation of the constitution of the United States.

2. The petitioner is entitled to issuance of a writ of habeas corpus from this court.

IT IS ORDERED that a writ will issue unless the respondent and the State of California shall, within sixty (60) days from the date this judgment becomes final, institute proceedings for a new trial.

IT IS FURTHER ORDERED that the Clerk will serve copies of this order, by United States mail, on the petitioner, on the Attorney General of the State of California, and on the Presiding Judge, Los Angeles County Superior Court.

DATED: March 6, 1974.

ROBERT J. KELLEHER
United States Ditrict Judge

United States District Court
Central District of California

LAWRENCE S. BITTAKER,

Petitioner,

v.

J.J. ENOMOTO,
Superintendent,

Respondent.

Civil No. 73-1021-RJK(T)
REPORT AND RECOMMENDATION OF MAGISTRATE

This report and recommendation is submitted to the Honorable Robert J. Kelleher, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(3) and General Order No. 104 of the United States District Court for the Central District of California.

On May 8, 1973, the petitioner, a California state prisoner, was permitted to file his petition for writ of habeas corpus, in forma pauperis, pursuant to 28 U.S.C. § 1915(a),

The petitioner states he was sentenced under the California Indeterminate Sentence Law, by the Los Angeles County Superior Court, after conviction for violation of section 459 of the California Penal Code (burglary).

On July 10, 1973, J.J. Enomoto was ordered substituted as respondent in place of D.J. McCarthy.

A return was ordered and filed. The petitioner filed a traverse.

It appears that the petitioner had been released on parole, since he lists 1723-¼ North Wilcox Avenue, Hollywood, California 90028 as his current address.

Petitioner's grounds for relief were as follows:

1. The denial of petitioner's motion to represent himself violates California and federal constitutional law.

2. The petitioner was not effectively represented by trial counsel.

The Magistrate has examined the unpublished opinion of the California Court of Appeal, attached herewith as Exhibit A; the clerk's transcript; and the reporter's transcript.

The petitioner has exhausted state remedies. All of the grounds raised herein were considered by the California Court of Appeal. Hearing was denied by the California Supreme Court, and the United States Supreme Court denied certiorari.

The petitioner's claim that he was denied effective representation by counsel is without merit. The record discloses that defense counsel strenuously cross-examined the prosecution witnesses, presented evidence in defendant's behalf, and argued the merits of the case. The trial judge complimented counsel on his skill and discretion (Rptr. Tr. p. 108). The services of counsel did not approach "a farce or mockery of justice." *Grove v. Wilson,* 368 F.2d 414, 416 (9th Cir. 1966). It has been clearly held that "[d]ue process does not require 'errorless counsel,' . . . " *Brubaker v. Dickson,* 310 F.2d 30, 37 (9th Cir. 1962).

Respondent has argued that the denial of petitioner's motions to represent himself did not violate either California or federal constitutional rights. In considering this question, the California Court of Appeal found that the trial court judge erred in denying petitioner the right to represent himself "solely on the ground that he lacked legal training." However, citing *People v. Sharp,* 7 Cal.3d 448 (petition for certiorari denied February 22, 1973), the Court of Appeal found that there was no requirement to reverse the judgment since there had been no miscarriage of justice. The *Sharp* case clearly expressed the holding that an erroneous denial of the right of self-representation would not impair the fairness of a trial without a showing of prejudice. The Court also noted that there was no direct ruling by the United States Supreme Court as to whether there is in fact a federal constitutional right to self-representation. The California Supreme Court relied on *Singer v. United States,* 380 U.S. 24 at 34-35 (1965). "The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right."

However, the latest ruling from the Ninth Circuit Court of Appeals expresses a contrary holding. In *Arnold v. United States,* 414 F.2d 1956, 1058 (9th Cir. 1969), *cert. denied,* 396 U.S. 1021 (1970), the Court stated as follows:

> "A defendant in a criminal case not only has a constitutional right to the assistance of counsel, he has a correlative constitutional right to refuse

> the advice or interference of counsel and to present his own case. A court has no more right to force an attorney on a defendant than it has to ignore the Sixth Amendment right to counsel."

In a recent case, the Ninth Circuit Court of Appeals concluded that the right to proceed pro se has a constitutional basis and the defendant need not show prejudice in order to secure reversal of a conviction. *United States v. Price,* 474 F.2d 1223 (9th Cir. 1973). There is, therefore, a line of cases in the Ninth Circuit holding that the right to proceed pro se is of constitutional dimensions. *Arnold v. United States,* 414 F.2d 1056, 1058 (9th Cir. 1969), *cert. denied,* 396 U.S. 1021 (1970); *Bayless v. United States,* 381 F.2d 67, 71 (9th Cir. 1967). The lastest holding indicates that a lack of ability on the part of the defendant to represent himself is insufficient in itself to justify a denial.

In view of the foregoing case law in this circuit, it appears that the petitioner is entitled to issuance of a writ of habeas corpus. It is therefore recommended that an order be issued by the Court granting the petition.

DATED: November 9, 1973.

VENETTA S. TASSOPULOS
UNITED STATES MAGISTRATE

United States District Court
Central District of California

LAWRENCE S. BITTAKER,

Petitioner,

v.

J.J. ENOMOTO,
Superintendent,

Respondent.

Civil No. 73-1021-RJK(T)
ORDER VACATING
JUDGMENT

Pursuant to 28 U.S.C. § 2241, this Court, in its order of March 8, 1974, conditionally granted a petition for writ of habeas corpus in the above-entitled case. Now, on the Court's own motion and pursuant to Rule 60(b) of the Federal Rules of Civil Procedure,

IT IS ORDERED that the order heretofore entered herein be and the same hereby is set aside.

APPENDIX D

IT IS FURTHER ORDERED that the petition for writ of habeas corpus in the above-entitled matter is again taken under submission by this court.

IT IS FURTHER ORDERED that the Clerk will serve copies of this order, by United States mail, on the petitioner, on the Attorney General of the State of California, and on the Presiding Judge, Los Angeles County Superior Court.

DATED: March 19, 1974.

ROBERT J. KELLEHER
United States District Judge

United States District Court
Central District of California

LAWRENCE S. BITTAKER,

Petitioner,

v.

J.J. ENOMOTO,
Superintendent,

Respondent.

Civil No. 73-1021-RJK(T)
ORDER CONDITIONALLY GRANTING PETITION FOR WRIT OF HABEAS CORPUS

On March 7, 1974, this Court entered an order conditionally granting Lawrence S. Bittaker's petition for a writ of habeas corpus. Thereafter, on March 19, 1974, this Court, on its own motion, in light of *Faretta v. California*, ___ U.S. ___ 95 S.Ct. 2525 (1975), then pending before the Supreme Court, set aside its order conditionally granting the petition and took the matter under submission.

APPENDIX E

In light of *Faretta,* this Court has reviewed the petition and the attached report and recommendation of the United States Magistrate, filed pursuant to 28 U.S.C. § 636(b)(3), and concurs with and adopts the findings and conclusions of the Magistrate.

IT IS ADJUDGED as follows:

1. The petitioner was convicted in violation of the Constitution of the United States.

2. The petitioner is entitled to issuance of a writ of habeas corpus from this court.

IT IS ORDERED that a writ will issue unless the respondent and the State of California shall, within sixty (60) days from the date this judgment becomes final, institute proceedings for a new trial.

IT IS FURTHER ORDERED that the Clerk will serve copies of this Order, by United States mail, on the petitioner, on the Attorney General of the State of California, and on the Presiding Judge, Los Angeles County Superior Court.

DATED: September 4, 1975.

ROBERT J. KELLEHER
United States District Judge

NOT TO BE PUBLISHED
IN THE OFFICIAL REPORTS

In the Court of Appeal of the State of California

SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE

Plaintiff and Respondent,

v.

LAWRENCE SIGMOND BITTAKER,

Defendant and Appellant.

2d Crim. No. 20828
(Sup. Ct. No. A 116529)

APPEAL from judgment of the Superior Court of Los Angeles County. Harold J. Ackerman, Judge. **Affirmed.**

Reginald D. Armstrong, under appointment by the Court of Appeal, and Lawrence Sigmond Bittaker, in propria persona, for Defendant and Appellant.

APPENDIX F

Evelle J. Younger, Attorney General, Herbert L. Ashby, Chief Assistant Attorney General, Criminal Division, William E. James, Assistant Attorney General, Appeals Section, and Norman H. Sokolow and William S. Abbey, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant was charged with burglary. (Pen. Code, § 459.) He was also charged with, and admitted, three prior felony convictions. After a jury trial he was found guilty of second degree burglary. He appeals from the judgment of conviction, contending (1) that the evidence was insufficient to sustain the judgment; (2) that the court below erred prejudicially in denying him the right of self-representation; and (3) that he was denied the assistance of effective trial counsel.

Sufficiency of Evidence

The secretary and another employee of the Woodland Hills Community Church testified that everthing was in order in the church when it was locked up for the night of January 28, 1971. The custodian of the church discovered next morning that it had been entered during the night and that numerous items of office equipment were missing. The secretary testified that the missing property consisted of three typewriters, a dictaphone, a large table lamp, two sets of bells packed in suitcase-like boxes, and miscellaneous supplies.

Dr. Charles F. Squire, a dentist, testified that he and his wife lived in an apartment about 75 to 100 yards from the church; that their bedroom was adjacent to the sidewalk; that during the early morning hours of January 29, he was awakened by a noise on the sidewalk near his bedroom window; that he heard the sound of a car door or trunk lid being closed; that because his car was parked in front of his

apartment, he got out of bed to investigate; that he saw a man walking on the sidewalk toward the church; that he observed an unfamiliar car parked nearby, a 1960 or 1961 Ford Thunderbird, light blue or white in color, license number JMD 475; that he went back to bed and shortly thereafter again heard footsteps on the sidewalk; that he went to the window and saw the same man carrying what appeared to be two suitcases to the Thunderbird; that he returned to bed, arose a short time later when he again heard footsteps on the sidewalk and the closing of the car door or trunk lid; that he went to the window and again observed the same man walking on the sidewalk. The witness stated that he saw the man's face from a distance of from 15 to 20 feet on the three occasions, and that the area was well lighted. He testified that the man was wearing a sport coat and slacks.

Doctor Squire's wife reported the incident to the police. The police ascertained that the Thunderbird car was registered to defendant. The police went to defendant's residence and placed him under arrest. Later the police showed Doctor Squire six photographs of different persons of somewhat similar appearance. Doctor Squire selected defendant's photograph and stated: "This was the general appearance of the man I saw . . . " At trial the doctor identified defendant as having the same general appearance as the man he had seen on the three occasions on the morning of the burglary.

Defendant did not testify at trial. An alibi witness, Francisco Castillo, defendant's roommate, testified that defendant took him to work between 7:00 p.m. and 7:30 p.m. on January 28; that defendant had not been feeling well and he, Castillo, telephoned defendant two or three times during the course of the evening; that when he finished work between 12:45 a.m. or 1:00 a.m., he was

picked up by defendant; that they went directly home, stayed up until 2:00 a.m. or 3:00 a.m., and went to bed; that he was a light sleeper and was not disturbed during the night.

B.J. McAlpin, an attorney, testified that he had worked for some 13 years in the field of automobile sales; that he had repossessed approximately one hundred automobiles during that time; and that it was very easy for a person with little experience to "hot-wire" and steal a Thunderbird.

In evaluating this evidence we are guided by principles recently summarized in *People v. Reilly*, 3 Cal.3d 421, 425: "An appellate court must view the evidence in the light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgement.' [Citations.] The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. [Citation.] The appellate court must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt. [Citation.]"

Here, defendant and his automobile were observed by a disinterested witness at the scene of the burglary. The hour of his presence and the nature of his activity were most unusual. He was observed carrying to his car two items similar to property later reported as having been stolen. Applying the rules set forth in *Reilly, supra,* to these facts we conclude that the evidence is sufficient to support the finding of the jury.

Right of Self-Representation

At defendant's arraignment on March 2, 1971 before Judge Rosenthal the following colloquy occurred:

"THE DEFENDANT: Defendant wishes to appear in Propria Persona, Your Honor.

"THE COURT: What qualifications do you have to do that?

"THE DEFENDANT: Prior experiences in this capacity.

"THE COURT: Have you ever studied law at any university, school, or college?

"THE DEFENDANT: Not a such a school.

"THE COURT: The only school you have attended probably is the County Jail law library?

"THE DEFENDANT: I've never been in that one.

"THE COURT: Well, did you ever study law at any State facility?

"THE DEFENDANT: On an amateurish basis, Your Honor.

"THE COURT: I don't think I can allow you to represent yourself.

"THE DEFENDANT: I wish to take exception and demand my right.

"THE COURT: You are denied the right to proceed in pro per. The Public Defender is appointed to represent you."

On March 15 the following proceedings were held before Judge Rosenthal:

"MR. MILLER [Deputy Public Defender]: Your

Honor, in this matter, the defendant has informed me that he wishes to make a motion to go pro per and to represent himself. He informed me that he did not wish to have the Public Defender represent him.

"THE COURT: Mr. Bittaker, if I remember, you made a motion to that extent originally and I denied it, is that correct?

"THE DEFENDANT: That is correct, sir.

"THE COURT: You want to renew the motion at this time? . . .

"THE DEFENDANT: If I may make a formal motion. I'm prepared at this time to answer your questions.

"THE COURT: All right, make the motion.

"THE DEFENDANT: If it pleases the court . . . the Constitution guarantees the defendant the right to counsel but the defendant is prepared to waive that right and no statute can force the defendant to be represented by the Public Defender. If the Court questions it before the Bar one Charles Maple, the Public Defender of the Los Angeles Public Defender's Office can be contacted as some time ago Mr. Maple strongly commended the defendant on a handling of a felony trial as to two and a half days.

"Whether or not the Court at this time permits the defendant to proceed in pro per, the trial court must do so or commit reversible error if this Court denies defendant the preliminary hearing transcripts and prejudices the chances to proceed to trial without postponement in this instant case.

"Formalized legal training is not necessary to conduct a legal trial. Only common knowledge is necessary to attack the credibility, as the defendant has an IQ of 138, an

excellent command of the English language, and prior trial experience. There is not sufficient cause to believe the defendant incompetent to proceed pro per.

"THE COURT: As I recall, the last time the defendant informed the Court that he had never completed high school or college.

"THE DEFENDANT: I have completed high school and was enrolled in college at the time of my arrest.

"THE COURT: And did you at any time take any legal courses?

"THE DEFENDANT: Business law; no formalized training in terms of criminal law, Your Honor.

"THE COURT: And you have no degree authorizing you to practice law?

"THE DEFENDANT: I thought I had the backing of the Constitution of the United States. As I said a moment ago, I have gone pro per before.

"I conducted two and a half days of trial. The judge in the courtroom prior to when I tried that case denied my doing so in his courtroom. He had me rescheduled to another courtroom. While waiting in the bull pen for such removal I heard this judge tell the prospective jury panel that under the law I was entitled to it but he would not have it in his courtroom.

"THE COURT: Well, every judge has a right to his own interpretation of the law and it is my understanding that no person can represent himself unless they are qualified by education, background, and experience, and it is my understanding that if I allow you to represent yourself I actually am allowing you to testify against yourself or misrepresent yourself and not give you all the rights to which the constitution also gives you. So at this

time motion again will be denied."

Defendant, after some further dissertation elected to remain mute, a plea of not guilty was entered on his behalf, and the case was set for trial.

In *People v. Sharp,* ____ Cal.3d ____, ____,* and in *People v. Siegenthaler,* ____ Cal.3d ____, ____, ** our Supreme Court held that the right of self-representation is not constitutionally compelled, and that the error, if any, in withholding such right does not require a reversal except where a miscarriage of justice results. (See Cal. Const., art. VI, § 13; *People v. Watson,* 46 Cal.2d 818, 834-835.) The court added in *Sharp,* at page ____***: "We have heretofore set forth standards by which a trial court may determine the competency of an accused who wishes to represent himself as a condition for granting such a motion (see *People v. Floyd* (1970) 1 Cal.3d 694, 702-703 and cases cited there), and we do not now depart therefrom."

Floyd states that "a defendant's right to represent himself cannot be denied simply because he is unable to 'demonstrate either the acumen or *the learning* of a skilled lawyer.'" (1 Cal.3d at p. 702.) Here the court below erred in denying defendant the right of self-representation solely on the ground that he lacked legal training. It also erred in not making the inquiry suggested by *Floyd,* whether "defendant has an intelligent conception of the consequences of his act . . . and understands the nature of the offense, the available pleas and defenses, and the possible punishments." (1 Cal.3d at p. 703.) But as pointed out in *Sharp, supra,* and *Siegenthaler, supra,* such error

* Crim. 15540, filed July 7, 1972; page 23 of typewritten opinion.

** Crim. 15541, filed July 7, 1972; page 9 of typewritten opinion.

*** Page 23 of typewritten opinion.

requires a reversal only if it results in a miscarriage of justice. Defendant argues that here there was a miscarriage of justice in that he had ineffective trial counsel.

Assistance of Trial Counsel

In a brief filed in propria persona, defendant contends that the public defender did not present all the evidence at trial which, he, defendant would have done if he had been permitted to conduct his own defense; he mentions such evidence as: that all of his shoes were rubber soled and not likely to make the noise heard by the eyewitness; that he did not own a sport coat as described by Doctor Squire; that no inquiry was made as to the type of tool used to gain entrance to the office or whether defendant owned such a tool; that since he had extensive automobile, locksmith and electrical skills, thereby making it easy for him to steal a car, it would be ridiculous for him to use his own car in a burglary; that appointed counsel did not interview his alibi witness until just prior to trial.

"To justify relief on the ground that counsel was inadequate, it must appear that the trial was reduced to a farce or sham through the attorney's lack of competence, diligence, or knowledge of law." (*People v. Ibarra,* 60 Cal.2d 460, 464.) No such showing is made here. The evidence now proffered by defendant, if believed, would have added little if anything to defendant's defense. Defendant does not indicate that his trial counsel's belated interview with his alibi witness caused any prejudice; he does not point out what if any additional evidence could have been produced had counsel conferred with the witness in advance of the day of trial.

The record indicates that defendant was represented by able counsel who strenuously cross-examined the prosecution's witnesses, presented evidence in defendant's behalf, and argued the merits of the case. From our review

of the record we conclude that it is not reasonably probable that a result more favorable to defendant would have been reached if he had been permitted to represent himself. The error in denying defendant such permission was therefore not prejudicial. (Cal. Const., art. VI, § 13; *People v. Watson, supra,* 46 Cal.2d 818, 834-835.)

Judgment affirmed.

SCHWEITZER, J.

We concur:

FORD, P.J.
ALLPORT, J.

Los Angeles, Cal. Aug. 1-1972

TITLE

PEOPLE *v.*
BITTAKER

No. 20828

PETITION FOR REHEARING DENIED.

CLAY ROBBINS, *Clerk*

APPENDIX G

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102
SEP. 20, 1972

DEAR SIR: *I have this day filed Order*

HEARING DENIED

In re:

2 Crim. *No.* 20828

People

v.

Bittaker

Respectfully,

G.E. BISHEL
Clerk

APPENDIX H

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

February 20, 1973

Mr. L.S. Bittaker
P.O. Box A-E
San Luis Obispo, Calif. 93401

RE: BITTAKER v. CALIFORNIA,
No. 72-5477.

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case.

Very truly yours,
MICHAEL RODAK, JR., Clerk
By

Helen Taylor, (Mrs.)
Assistant Clerk

Hon. Evelle J. Younger
Attorney General of Calif.
State Bldg.-Civic Center
217 West First St.
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APPENDIX I

Supreme Court, U. S.
FILED
MAR 13 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1978
No. 78-1099

J. MARQUEZ, Superintendent,

Petitioner,

v.

LAWRENCE S. BITTAKER,

Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Pursuant to Rule 24(5) of the United States Supreme Court, petitioner, J. Marquez, Superintendent of the California Correctional Institute at Tehachapi, hereby desires to file this Supplement to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in order to discuss a decision rendered subsequent to the filing of said petition, namely, the Ninth Circuit Opinion of *Paul Manning Walker v. O. A. Loggins, Superintendent,* No. 77-3603 (9th Cir., filed February 1, 1979).

SUPPLEMENTAL ARGUMENT IN SUPPORT OF WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

The dissent of Circuit Judge Carter in the recent Ninth Circuit decision of *Paul Manning Walker v. O. A. Loggins, Superintendent, supra,* No. 77-3603 (9th Cir., filed February 1, 1979), provides additional reasons why the petition for writ of certiorari should be granted. A copy of the *Walker* opinion is attached hereto as Appendix.

On February 1, 1979, the Ninth Circuit filed its decision in *Paul Manning Walker v. O. A. Loggins, Superintendent, supra.* The case arose out of a habeas corpus action in which a state defendant sought habeas corpus relief from a state conviction of voluntary manslaughter, assault with a deadly weapon, sale of cocaine and conspiracy to sell cocaine. The Ninth Circuit rejected a double jeopardy argument of petitioner but on the issue of self-representation, followed the opinion of *Bittaker v. Enomoto,* (9th Cir., August 3, 1978) 587 F.2d 400, the subject case of this petition. The Ninth Circuit in the *Walker* opinion held that even though the case arose before the decision of *Faretta v. California* (1975) 422 U.S. 806, which set forth the constitutional right of self-representation, Walker could avail himself of the Ninth Circuit right of self-representation pursuant to the *Bittaker* decision. Thus, the circuit Court of Appeals remanded the matter back to the Federal District Court to determine whether or not there was in fact an unequivocal request for self-representation.

However, Circuit Judge James M. Carter, in a forceful and logical dissent discussed in great detail the insurmountable problems arising from the *Bittaker* decision. This dissent is important because it shows that the Ninth Circuit itself is not unanimous relative to the soundness of

the *Bittaker* decision (presently a petition for rehearing *en banc* is pending in the *Walker* case). Judge Carter criticized the *Bittaker* opinion, stating that the Circuit Court should have considered five other alternatives, as follows:

> "1. Yield to and follow state law.
>
> "2. Hold that *Faretta* was based on a different constitutional basis than our Ninth Circuit opinions and that we need not follow our prior cases based on different premises.
>
> "3. We could have required a showing of prejudice to a defendant and limited our decision to cases decided in California *before Faretta.*
>
> "4. We could and should have considered the effect of our decision on state law enforcement, a factor ignored in footnote 2 in *Bittaker.*
>
> "5. We could have held, as proposed in my first draft of the present case, that our cases had never upheld the right of self-representation in a state criminal case, and our prior cases did not command we do so." (Appendix, p. 16.)

Judge Carter stated that the Ninth Circuit should have yielded to state law noting that:

> "We apparently only pay lip service to the principle that we should interfere in state criminal matters to as limited a degree as possible through a policy of fostering federal-state comity. [Citation omitted.]" (Appendix, p. 16.)

Thus Judge Carter's dissent is in agreement with the position of petitioner that in the interest of comity, habeas corpus relief should not have been granted on the basis of denial of self-representation where the assertion of that

right took place before *Faretta.* (Petn., p. 7.) Additionally, Judge Carter noted that the *Faretta* opinion held that the right to self-representative was implied in the structure of the Sixth Amendment itself, while the Ninth Circuit had expressed it as a correlative right and a counterpart to the right to counsel. (Appendix, p. 16.) Thus Judge Carter recognized the problem raised in the petition herein that it would be incongruous to enforce self-representation on the states based upon a different conceptual underpinning than that in *Faretta* itself. (Petn., pp. 12-13.)

Judge Carter also noted that a possible alternative would have been to require a showing of prejudice in those cases where a defendant was denied his request to represent himself before the *Faretta* decision down. (Appendix, p. 17.)

In his dissent, Judge Carter also noted that footnote 2 of the *Bittaker* decision (which criticizes the state for mentioning several times that one of the prisoners who might benefit from the *Faretta* decision was Charles Manson) was ". . . an odd way to avoid a serious problem." (Appendix, p. 18.) Judge Carter recognized that the state's reliance on *People v. Manson,* 61 Cal. App.3d 102, 132 Cal.Rptr. 265 (1976), *cert. denied,* 430 U.S. 986, (1977), was an important consideration in terms of the effect *Bittaker* would have on the general administration of justice, both in the federal and state courts, relative to the retroactivity problem. (Appendix, p. 18.) Thus the petition filed with this Court is in accordance with Judge Carter's dissent that the state may properly argue the effect retroactive application of *Faretta* would have upon the administration of justice within its borders as applied to Charles Manson and others. (Petn., pp. 16-17.)

Finally, Judge Carter concluded that the prior Ninth

Circuit law before *Faretta* was never meant to apply that circuit's right of self-representation to state courts under federal habeas corpus. (Appendix, pp. 18-23.) Judge Carter concluded that the Ninth Circuit pre-*Faretta* rule set forth only a limited constitutional right to waive counsel, quoting language from the decision in *United States v. Dujanovic,* (9th Cir. 1973) 486 F.2d 182, at page 186, which he defines as the pre-*Faretta* Ninth Circuit test:

> ". . . . An accused has the limited constitutional right upon demand to competently and intelligently waive his constitutional right to assistance of competent counsel and assume the management and control of his defense or participate therein under controlled circumstances as determined by the trial court." (Appendix, p. 22-23.)

Thus Judge Carter recognized that the right of self-representation prior to *Faretta* had not been extended to defendants in a state criminal proceeding. (Appendix, pp. 22-23.)

Judge Carter, by reason of his dissent, points out "horribles" which would result in the wake of the *Bittaker* decision. (Appendix, p. 19.) Far from allowing the decision in *Bittaker* to remain in effect without proper criticism, Judge Carter has stated:

> "One of my colleagues responded to a proposed opinion in another case as follows: 'The burden [of preparing a dissent] overcomes my outrage [at the holding of the opinion]. I concur.'
>
> "Although I have let this case simmer for a considerable time, I cannot say I concur." (Appendix, p. 13.)

It is respectfully and sincerely hoped that this Court, for the reasons set forth in the petition for writ of certiorari and the forceful and logical dissent of Judge Carter, will also not concur with the *Bittaker* decision, but that instead the petition for writ of certiorari be granted in this case.

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition, petitioner submits that a writ of certiorari should issue and review the decision in the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Paul Manning WALKER,

Petitioner-Appellant,

v.

O.A. LOGGINS, Superintendent,

Respondent-Appellee.

No. **77-3603**

United States Court of Appeals For the Ninth Circuit

February 1, 1979

Appeal from the United States District Court for the Eastern District of California.

Before BROWNING, CARTER and ANDERSON, Circuit Judges.

PER CURIAM:

This is an appeal from the district court's denial of Paul Manning Walker's petition for habeas corpus relief from a California conviction. Walker makes two arguments: (1) his conviction for both manslaughter and assault with a deadly weapon for the same act violated his Fifth Amendment right not to be twice placed in jeopardy; and (2) the trial court's denial of his request to represent himself violated his constitutional right to self-representation under the Sixth Amendment.

Walker's first contention is without merit. The recent decision of another panel in *Bittaker v. Enomoto,* 587 F.2d 400 (9th Cir. 1978), requires that we vacate and remand for reconsideration of Walker's claim of denial of his right to self-representation.

APPENDIX A

I. FACTS

On August 8, 1974, appellant Walker was convicted by a jury in the Superior Court of the State of California for the County of Solano of voluntary manslaughter, assault with a deadly weapon, three counts of selling cocaine, and one count of conspiracy to sell cocaine. He had shot and killed an undercover narcotics agent during a bungled narcotics bust. The trial judge merged Walker's sentences for manslaughter and assault with a deadly weapon and ran them consecutive to the drug conviction sentences.

On appeal to the California Court of Appeal, First Appellate District, Division Three, the conviction was affirmed on all counts. However, while California law permits a defendant to be *convicted* of both manslaughter and assault with a deadly weapon for the same act, it does not permit *punishment* for both offenses. The California Court of Appeal noted that "[t]he usual procedure in such situations is to leave standing the sentence for the most serious offense of which the defendant was convicted. While manslaughter is more serious from the standpoint of the consequences to the victim, the legislature has imposed the greater penalty for the offense of assault with a deadly weapon." *People v. Walker,* 1 Crim. 13861 (1976) (Unpublished). Therefore, Walker's sentence was modified to stay the execution of his manslaughter sentence pending service of the assault sentence, the stay to become permanent upon completion of the assault sentence. *People v. Walker, supra.*

On March 28, 1977, Walker filed a petition for habeas corpus in the United States District Court, Northern District of California. The petition was transferred to the United States District Court, Eastern District of California. Walker raised, *inter alia,* the self-representation and the double jeopardy issues, but both were decided against

him by the district court. Counsel for Walker filed a petition for reconsideration which failed to convince the district court to grant his petition, but did convince the court that a justiciable question exists regarding the petitioner's self-representation claim. Accordingly the district court issued Walker a certificate of probable cause to appeal, as required by 28 U.S.C. § 2253 and Rule 22(b) of the Federal Rules of Appellate Procedure.

II. DOUBLE JEOPARDY

Walker contends his conviction of both assault with a deadly weapon and voluntary manslaughter arising from the same act committed against the same person constitutes double jeopardy. Allegedly, if an indictment for murder names the weapon used, then the evidence needed to prove the murder charge (or any lesser included offense such as manslaughter, as here) is identical to that needed to prove assault with a deadly weapon. This arguably makes the assault itself a lesser included offense of the murder charge.[1]

Where the same act constitutes a violation of two distinct statutory provision, the test laid down in *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932), for determining whether there are two offenses or only one is "whether each provision requires proof of an additional fact which the other does not." *See Gore v. United States,* 357 U.S. 386, 388 93, 78 S. Ct. 1280, 2 L.Ed.2d 1405 (1958); *Pereira v. United*

[1] The state sentenced Walker only on the assault conviction. By his double jeopardy argument Walker is seeking to vacate the assault conviction, which would require that he serve only the lesser sentence for manslaughter.

States, 347 U.S. 1, 9, 74 S.Ct. 358, 98 L.Ed. 435 (1954); *United States v. Kearney,* 560 F.2d 1358, 1366 (9th Cir. 1977), *cert. denied,* 434 U.S. 971, 98 S.Ct. 522, 54 L.Ed.2d 460 (1977). *Cf. United States v. Raborn,* 575 F.2d 688 (9th Cir. 1978); *United States v. Stolarz,* 550 F.2d 488, 491 (9th Cir. 1977), *cert. denied,* 434 U.S. 851, 98 S.Ct. 162, 54 L.Ed.2d 119 (1977); *Olais-Castro v. United States,* 416 F.2d 1155, 1157 (9th Cir. 1969).

[1,2] The application of this test focuses on the statutory elements of the offense charged, not the particular manner in which the offense was committed or described in the indictment.[2] *Iannella v. United States,* 420 U.S. 770, 785 n.17, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975). Thus, it is irrelevant that the use of a pistol was charged in Walker's indictment for murder. *See generally People v.*

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[2]In *Ianelli,* the Supreme Court explained:

> The test articulated in *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), serves a generally similar function of identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction. In determining whether separate punishment might be imposed, *Blockburger* requires that courts examine the offenses to ascertain "whether each provision requires proof of fact which the other does not." *Id.*, at 304, 52 S.Ct. at 152. As *Blockburger* and other decisions applying its principle reveal, see, *e.g., Gore v. United States,* 357 U.S. 386, 78 s.Ct. 1280, 2 L.Ed.2d 1405 (1958); *American Tobacco Co. v. United States,* 328 U.S. 781, 788-789, 66 S.Ct. 1125, 1128-1129, 90 L.Ed. 1575 (1946), the Court's application of the test focuses on the statutory elements of the offense. If each requires proof of fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.

Ianelli v. United States, 420 U.S. 770, 785 n. 17, 95 S.Ct. 1284, 1293-1294, 43 L.Ed.2d 616 (1975).

Wilson, 62 Cal.App.3d 370, 132 Cal. Rptr. 813 (1976).

Here neither murder nor manslaughter need be committed with a deadly weapon, as is required in the assault charge. And the death of a human being is not an element of assault with a deadly weapon, as it is in the murder or manslaughter charge. Under *federal* law Walker constitutionally could have been convicted and sentenced for both offenses. Therefore, there is no error in California's more lenient rule which permits a defendant to be convicted for two distinct offenses arising out ot the same act, but prohibits punishment for both offenses.

III. SELF REPRESENTATION

[3] On January 16, 1974, at his state trial, Walker made the following unsuccessful request to represent himself:

DEFENDANT WALKER: I would like to have it noted that I do not recognize this person as my attorney.

THE COURT: All right. Let the record so indicate.

* * * * * *

DEFENDANT WALKER: I'd like to represent myself —

THE COURT: Well —

DEFENDANT WALKER: — is what I'm saying.

THE COURT: The court is not going to allow you to defend yourself. It is going to appoint the Public Defender to represent you.

At the time of this request, the Supreme Court had not ruled definitely whether state defendants have a Sixth Amendment right to represent themselves. That question was answered in the affirmative in *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

The State contends that it was under not obligation prior to *Faretta* to permit defendants to represent themselves, and that its refusal to do so at Walker's trial cannot provide a basis for habeas relief.

The recent decision in *Bittaker v. Enomoto,* 587 F.2d 400 (9th Cir. 1978), is controlling. As the court said:

> [T]he law of this circuit at the time of [defendant's] state court trial [1974] had already been established in a fashion consistent with the Supreme Court's statement of the law in *Faretta. Arnold v. United States,* 414 F.2d 1056, 1058 (9th Cir. 1969), *cert. denied,* 396 U.S. 1021, 90 S.Ct. 593, 24 L.Ed.2d 514 (1970); *Bayless v. United States,* 381 F.2d 67, 71 (9th Cir. 1967). This circuit had stated in federal cases that self-representation was a corollary of the Sixth Amendment right to counsel. Because the defendant could waive his Sixth Amendment right, we said he could also insist on self-representation as a constitutional, as well as a statutory, right. Until now, we have had no occasion to apply the federal constitutional right to state habeas petitioners. . . .
>
> There can be little doubt, however, that, if squarely faced with the issue, we would have applied the right to self-representation to a state habeas petitioner.

Id., at 401-402. Thus, under the law of this circuit when Walker was tried, Walker had a federal constitutional right to represent himself. Denial of that right would entitle him to habeas relief.

The record does not clearly show, however, whether Walker's right to represent himself was in fact denied. We have only a partial excerpt from the transcript of the proceedings in state court. We cannot be sure that the whole record will establish that Walker's demand for self-representation was sufficiently "unequivocal" to trigger constitutional protection, *see Meeks v. Craven,* 482 F.2d 465, 467 (9th Cir. 1973).

We therefore vacate the judgment denying Walker's habeas petition and remand to the district court for full consideration of the self-representation claim.

REMANDED.

JAMES M. CARTER, Circuit Judge, dissenting:

One of my colleagues responded to a proposed opinion in another case as follows: "The burden [of preparing a dissent] overcomes my outrage [at the holding of the opinion]. I concur."

Although I have let this case simmer for a considerable time, I cannot say I concur.

The dissent is directed to the failure of my colleagues to ask for an en banc but instead merely following *Bittaker v. Enomoto* (9 Cir. 1978), 587 F.2d 400.

The following material is submitted in an attempt to demonstrate that the decisions in *Bittaker v. Enomoto, supra,* and in this case, which follows *Bittaker,* are not compelled by precedent; and to show that the panels could have chosen other alternatives for a contrary holding.

The cases held that a state prisoner who had been denied the right to represent himself by a state court before the Supreme Court decided *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 on June 30, 1975, has a constitutional right of self-representation and is entitled to relief by habeas corpus in the federal courts.

Bittaker did not consider the impact of its decision on cases in the state courts when, before *Faretta*, defendants had been denied the right of self-representation. In footnote 2 the panel states it was improper for the state to call

attention to the case of Charles Manson. We discuss this footnote later herein.

The Effect of the Decision

The effect of *Bittaker* and *Walker v. Loggins,* the present case, will be most unfortunate. In recent years, in many cases, the trial courts of California have refused to let a defendant represent himself and have appointed counsel for him. The events in the present case began with the shooting of the undercover agent on December 5, 1972. Many of these other cases in the California courts will have arisen even before that date. The rule of *Bittaker v. Enomoto, supra,* and the present case, will result in either a jail deliverance of defendants in this category or new trials without counsel present for the defendant, a most difficult situation for a trial judge. The absurdity of the whole situation rests on a series of elements:

(1) The Supreme Court of the United States in *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), for the first time determined that defendants in state prosecutions had a constitutional right of self-representation. For 200 years no Supreme Court case had ever so held.

(2) Attorneys had been appointed for those defendants in state cases where the right to proceed without counsel had been denied them. As a practical matter those defendants were far more adequately represented in their trials than they would have been, had the state courts allowed them to proceed without counsel. This is a case where, although a constitutional right was declared in favor of the defendant, the failure to accord him that right as a practical matter, in almost all the cases, had not hurt or injured him in any way.

(3) Before the *Faretta* case in the U.S. Supreme Court,

the California courts had denied that such a right existed for a defendant in their courts. *People v. Sharp,* 7 Cal.3d 448, 103 Cal. Rptr. 233, 499 P.2d 489 (1973), *cert. denied,* 410 U.S. 944, 93 S.Ct. 1380, 35 L.Ed.2d 610.

(4) After *Faretta,* the California Supreme Court construed the *Faretta* rule as one to be applied prospectively only in those cases where the accused had sought to represent himself in trials that commenced on or after June 30, 1975, the date of the U.S. Supreme Court decision in *Faretta. People v. McDaniel,* 16 Cal.3d 156, 158, 127 Cal. Rptr. 467, 545 P.2d 843 (1976).

Faced with the effect that our decision will have on state court cases, there were various ways in which our court could have treated the problem without bringing about the unfortunate results referred to. If we had reversed the grant of habeas corpus below, instead of affirming, our decision could in no way affect cases *thereafter* arising in the state courts, since *Faretta* would obviously control. Our decision at best could only affect cases arising and decided in the state courts *before Faretta.*

Such alternatives were as follows:

1. Yield to and follow state law.

2. Hold that *Faretta* was based on a different constitutional basis than our Ninth Circuit opinions and that we need not follow our prior cases based on different premises.

3. We could have required a showing of prejudice to a defendant and limited our decision to cases decided in California *before Faretta.*

4. We could and should have considered the effect of our decision on state law enforcement, a factor ignored in footnote 2 in *Bittaker.*

5. We could have held, as proposed in my first draft of the present case, that our cases had never upheld the right of self-representation in a state criminal case, and our prior cases did not command we do so.

1. We should yield to the state law.

We apparently only pay lip service to the principle that we should interfere in state criminal matters to as limited a degree as possible through a policy of fostering federal-state comity. *Gonzales v. Stone* (9 Cir. 1976), 546 F.2d 807, 810. We could therefore have stated that although our cases prior to *Faretta* had held that there was a right to self-representation in federal cases, nevertheless we could have acknowledged and yielded to the California rule as stated in *People v. Sharp, supra,* which denied the right of self-representation to a defendant prior to *Faretta,* and we could have declined to inflict our decision on the California courts.

This could be a solid ground for a reversal. True, there would be one rule in federal cases and another in state cases. But there would be the clear recognition we were not going to undermine the California position.

2. Faretta in the U.S. Supreme Court was based upon a principle different from our prior decisions in the Ninth Circuit.

The Supreme Court in *Faretta* had held that the right to self-representation was implied in the structure of the Sixth Amendment. 422 U.S. at 817, 95 S.Ct. 2525, *et seq.* *Faretta* expressly rejected self-representation as stemming from a correlative right — the right to have an attorney. 422 U.S. at 819, 820, 95 S.Ct. 2525, and footnote 15. Our cases had expressed it as a counterpart to

the right to counsel. *Arnold v. United States* (9 Cir. 1969), 414 F.2d 1056, 1058 *cert. denied,* 396 U.S. 1021, 90 S.Ct. 593, 24 L.Ed.2d 514 (1970). We therefore could have stated that in cases arising before *Faretta* we would not be bound to follow our prior decisions and therefore not required to afford state defendants the benefit of the right to counsel.

3. Showing of prejudice could be required.

The Supreme Court vacated the judgment in *Faretta* without considering possible prejudice to the defendant. 422 U.S. at 836, 95 S.Ct. 2525. Indeed, it noted that in most cases the defendant's right would suffer if he or she asserted the right to self-representation. 422 U.S. at 834, 95 S.Ct. 2525. Very few defendants would be able to satisfactorily show that they suffered prejudiced from the assistance of unwanted counsel. In fact, I think we can take judicial notice from records we have seen that defendants exercising their right of self-representation uniformly have less success than those for whom counsel had been appointed. We could also, since we are framing a rule for our circuit, provide that our decision was only applicable to defendants whose cases had originated before *Faretta.*

Thus, in cases coming after *Faretta,* there would be no requirement to show prejudice. Such a requirement would probably make it almost impossible in most cases for a defendant to secure his right to counsel guaranteed by *Faretta.* The majority in *Bittaker* conclude as to this problem that "The purpose of the right [self-representation] is to protect the defendant's personal autonomy, not to promote the convenience or efficiency of the trial." *Faretta,* 422 U.S. at 834, 95 S.Ct. at 2540. This result may be well enough for cases arising after *Faretta*; it

certainly is not compelled as to the cases arising before *Faretta.*

4. Footnote 2.

The panel in *Bittaker, supra,* has inserted footnote 2 as follows:

> "The state mentions several times that one of its prisoners who may benefit from the *Faretta* decision is Charles Manson. We do not encourage this type of advocacy. A federal court must make its decision in accord with the Constitution and the laws, without regard to the notoriety of parties or nonparties."

This is an odd way to avoid a serious problem.

For the benefit of those people not familiar with the case of *People v. Charles Manson,* 61 Cal. App.3d 102, 132 Cal. Rptr. 265 (1976) *cert. denied,* 430 U.S. 986, 97 S.Ct. 1686, 52 L.Ed.2d 382 (1977), let me state briefly the background of the reference to him in the footnote.

Manson was convicted for multiple murders committed on two successive days in August 1969. The case in the trial court required many months of trial, and it was seven years later that the decision on appeal came down affirming his conviction. Manson had claimed the right of self-representation, had been overruled, and counsel had been appointed for him and represented him throughout the trial. *Manson, supra,* p. 172.

The footnote may be correct in that we should not tailor any one of our decisions for its possible effect on some particular person in the state or federal court. However, we clearly have the right to consider what the effect of our decision will be on the general administration of justice, both in our court and in the state courts. *E.g.,* in solving the

retroactivity problem, the effect of the decision on the administration of justice is a pertinent inquiry. *Halliday v. United States,* 394 U.S. 831, 832, 89 S.Ct. 1498, 23 L.Ed.2d 16 (1969).

A great number of retrials will be required in the state courts because of the effect of *Bittaker* and this case. This is certainly a factor which we could legitimately consider.

5. Our cases permitted a different result.

Finally, we would have held that there was sufficient lack of uniformity in our prior Ninth Circuit decisions regarding the right to counsel so that we were free to say in a retroactive posture that our prior decisions did not compel the result in *Bittaker* and this case.

This is what I attempted to do in my proposed opinion in this case.

Unfortunately, the panel in *Bittaker* would not consider the retroactivity of *Faretta.* If *Faretta* was declared to have only a prospective operation, then the horribles listed above would not occur.

In fact, in the Eighth Circuit, *Martin v. Wyrick,* 568 F.2d 583 (1978), cites the cases and holds *Faretta* not retroactive, as does the California Supreme Court in *People v. McDaniel, supra.*

The panel in *Bittaker* did not reach the retroactivity question because it is of the view that prior cases in the Ninth Circuit had in substance held that the defendant had a constitutional right to represent himself in state court proceedings before the Supreme Court so held in *Faretta.*

In our case, the majority quotes from *Bittaker:*

> [T]he law of this circuit at the time of [defendant's] state court trial [1974] had already been established

in a fashion consistent with the Supreme Court's statement of the law in *Faretta. Arnold v. United States,* 414 F.2d 1056, 1058 (9th Cir. 1969), *cert. denied,* 396 U.S. 1021, 90 S.Ct. 593, 24 L.Ed.2d 514 (1970); *Bayless v. United States,* 381 F.2d 67, 71 (9th Cir. 1967). This circuit had stated in federal cases that self-representation was a corollary of the Sixth Amendment right to counsel. Because the defendant could waive his Sixth Amendment right, we said he could also insist on self-representation as a constitutional, as well as a statutory, right. Until now, we have had no occasion to apply the federal constitutional right to state habeas petitioners. . . .

There can be little doubt, however, that, if squarely faced with the issue, we would have applied the right to self-representation to a state habeas petitioner. (at p. 5).

Despite the apparent breadth of some of the language in our decisions, I think the right to self-representation in this circuit prior to *Faretta* had not been extended to defendants in state criminal proceedings.

On numerous occasions prior to *Faretta* this circuit held — with respect to *federal* criminal trials — that there is a constitutional right to self-representation. *See, e.g., Bayless v. United States,* 381 F.2d 67, 71 (9 Cir. 1967) ("A defendant has such a right [to represent oneself] and it is not only a statutory right but a constitutional right."); *Arnold v. United States,* 414 F.2d 1056, 1058 (9 Cir. 1969), *cert. denied,* 396 U.S. 1021, 90 S.Ct 593, 24 L.Ed.2d 514 (1970) ("A court has no more right to force an attorney on a defendant than it has to ignore the Sixth Amendment right to counsel."); *Hodge v. United States,* 414 F.2d 1040, 1042 (9 Cir. 1969); *Haslam v. United States,* 431 F.2d 362, 365 (9 Cir. 1970), *cert. denied,* 402 U.S. 976, 91 S.Ct. 1680, 29 L.Ed.2d 142 (1971) ("The constitutional right to assistance of counsel includes the correlative right to dispense with counsel and proceed *in propria persona.*"); *United states v. Pike,* 439 F.2d 695 (9 Cir. 1971) (" 'The right to act pro se * * * is a right arising out of the Federal Constitution and not the mere product of legislation or judicial decision.' ", quoting *United States v. Plattner,* 330 F.2d 271, 273 (2 Cir. 1964).); *United States v. Price,* 474 F.2d 1223, 1226 (9 Cir. 1973) (". . . it is now clear that the right to proceed *pro se* is not merely statutory, it is a right of constitutional dimension."). Notably, none of these holdings affirmatively extended the right to self-representation to state court proceedings.

In *Meeks v. Craven,* 482 F.2d 465 (9 Cir. 1973), the Ninth Circuit had the opportunity to determine whether the standard previously applied only in federal proceedings was also applicable in state proceedings, but declined. *Meeks* involved a petitioner in custody of California who filed a 28 U.S.C. § 2254 habeas corpus petition in federal court, alleging a denial of his right to self-representation. The Ninth Circuit noted the challenge to California's standard, but stated:

> "We do not reach this question, for we hold that Meeks did not make an 'unequivocal' demand to represent himself." *Id.* 482 F.2d at 467.

Nevertheless, *Meeks* contained a seed of a restriction of the scope of the language establishing the right to self-representation in this circuit. In a concurring opinion in *Meeks,* Judge Trask recognized the holdings in this circuit establishing a constitutional right to self-representation, but questioned their breadth. He suggested that the absolute character of the language of prior cases was justified neither by Supreme Court precedent nor by the

facts of the cases themselves. Although Judge Trask seemed to feel constrained to recognize some kind of right to waive counsel, he did not feel our circuit's cases should be construed to extend that right beyond the boundaries established by existing Supreme Court precedent.

This seed of restraint found fertile soil in *United States v. Dujanovic,* 486 F.2d 182 (9 Cir. 1973), decided less than one year before Walker's trial. On its facts, *Dujanovic* involved the contention by a defendant that his waiver of counsel was not competently, intelligently and voluntarily made. However, the court took this occasion to review the nature of the right to self-representation in the Ninth circuit, making two important points:

—(1) the right to self-representation as developed at that time in the Ninth Circuit flowed from "the two founts" of *Adams v. United States ex rel. McCann,* 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942) and *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). The court explained the thesis of these two cases to be "that the constitutional right of counsel . . . may be waived by an accused, through an intelligent relinquishment or abandonment thereof, and only then may the *correlative* constitutional right of self-representation be asserted and brought into play." *United States v. Dujanovic,* 486 F.2d at 185.

—(2) whatever the nature of the language of prior opinions in this circuit discussing the right, the decisions have progressed from "case to case" to meet "the exigencies of the given case." The composite rule was restated in open-ended terms to be: "An accused has the limited constitutional right upon demand to competently and intelligently waive his constitutional right to assistance of competent counsel and assume the management

and control of his defense or participate therein under controlled circumstances as determined by the trial court." *United States v. Dujanovic,* 486 F.2d at 186.

Dujanovic did not explicitly discuss the applicability of the right to self-representation in state criminal proceedings. But the strong implication from the opinion is that the right of self-representation in the Ninth Circuit should not be — and had not been — extended beyond the thesis of the Supreme Court decisions in *Adams* and *Johnson, supra.* Neither *Adams, Johnson,* nor any other Supreme Court precedent prior to *Faretta* had extended to defendants in state criminal trials the right to self-representation. *Faretta* itself makes this point. *Faretta v. California,* 422 U.S. at 814-15, 95 S.Ct. 2525. I conclude that despite the apparent breadth of the language of some of our decisions, the right to self-representation in this circuit, prior to *Faretta,* had not been extended to defendants in state criminal proceedings. *Accord Houston v. Nelson,* 404 F. Supp. 1108 at 1115.

Supreme Court, U. S.
FILED
APR 6 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1978
No. 78-1099

J. MARQUEZ, Superintendent,

Petitioner,

v.

LAWRENCE S. BITTAKER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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PRELIMINARY STATEMENT

Petitioner requests leave of court to submit the following reply memorandum pursuant to rule 24(4) of the Rules of the Supreme Court. This memorandum is submitted in reply to arguments raised in "Respondent's Brief in Opposition." There will be no attempt to repeat the arguments raised in the Petition for Writ of Certiorari but rather only new issues raised by the Brief in Opposition will be discussed.

ARGUMENT

I.

THE NINTH CIRCUIT HAS CREATED IN EFFECT TWO BODIES OF FEDERAL LAW BY APPLYING THE PRE-*FARETTA* LAW OF ITS CIRCUIT INSTEAD OF REACHING THE ISSUE OF THE RETROACTIVITY OF *FARETTA v. CALIFORNIA*, 422 U.S. 806 (1975).

Respondent alleges that the Ninth Circuit could properly rely on the pre-*Faretta* rule relating to self-representation instead of reaching the issue of the retroactivity of *Faretta v. California, supra,* 422 U.S. 806 (1975) since it was interpreting federal law. (Resp. Br. in Opp., pp. 6-8.) However, the Ninth Circuit in effect has created two bodies of federal law.

The purpose of the federal courts is to interpret and implement federal law. There can only be one body of federal law. At the time the Ninth Circuit decision in this case came down, the only federal law of self-representation then was the *Faretta* decision. Therefore the Ninth Circuit after *Faretta* came down, in order to determine whether or not a person could claim the right of self-representation before *Faretta,* had to interpret *Faretta* on the issue of retroactivity. This is because *Faretta* is the only federal standard enunciated by this Court on that point. The Ninth Circuit law of self-representation would be irrelevant after *Faretta* came down. To allow that body of law to exist along with *Faretta* would mean there would be two bodies of federal law applicable to self-representation which is an impossibility, namely, the Ninth Circuit law and *Faretta.* As such, once *Faretta* came down, the sole issue relative to whether or not self-representation existed as a constitutional right before *Faretta* was the question of retroactivity of *Faretta.*

Miranda v. Arizona (1966) 384 U.S. 436, held the police had to give certain constitutional rights to suspects in custody before they could be interrogated. This Court also held that *Miranda* would not be retroactive to trial beginning before June 13, 1966, the date *Miranda* was decided. (*Johnson v. New Jersey* (1966) 384 U.S. 719.) If, for example, before *Miranda* came down, one of the Circuits had held that rights as required in *Miranda* had to be given to suspects in custody before they could be questioned, a problem would arise in light of the *Johnson* decision. It would be anomalous to say the Circuit formulating the "Miranda rules" before *Miranda* came down could impose their interpretation on pre-*Miranda* state judgments by habeas corpus based upon that Circuit's (pre-*Miranda*) law in the face of the *Johnson* decision. To say otherwise, would mean there would be two contrary bodies of federal law, one national standard holding *Miranda* was not retroactive and the second within one Circuit applying that Circuit's pre-*Miranda* ruling to state judgments. Thus, the decision of the Ninth Circuit in this case is repugnant to the concept that there can be only one federal law. As such, the logical conclusion of respondent's argument, which would in effect create diverse bodies of federal law, should be additional grounds for granting certiorari.

Since *Faretta* has come down, it is the sole federal standard of self-representation. A lower federal court in determining whether or not a constitutional right of self-representation existed before *Faretta* must do so only in terms of retroactivity of that decision. Any other type of interpretation would create multiple bodies of federal law which cannot exist.

II.

SELF-REPRESENTATION HAS NOT ALWAYS BEEN RECOGNIZED AS A CONSTITUTIONAL RIGHT.

Respondent urges that the issue of retroactivity of *Faretta* need never be reached as self-representation has always been recognized as a constitutional right, and as such no new rule was created in that decision. (Resp. Br. in Opp., p. 13.) In *United States v. Peltier* (1975) 422 U.S. 531, 533, the court noted that the Ninth Circuit has held that the issue of the retroactivity of the doctrine of *Almeida-Sanchez v. United States* (1973) 413 U.S. 266, need never be reached because its holding relative to roving border patrols has always been the law. However that court held in *Peltier* at pages 535 *et seq.* that the *Almeida-Sanchez* doctrine would not be retroactively applied, thus impliedly rejecting the concept of the "old law-new law" distinction in terms of retroactivity.

Anyway the *Faretta* decision itself rejects the contention that self-representation was always a recognized constitutional right even before that decision came down. Justice Stewart writing for the majority noted that the question of whether or not there was a constitutional right to self-representation was "not an easy question." (*Faretta v. California, supra,* 422 U.S. 806, 807.) In addition, Justice Stewart aptly stated at pages 832 and 833 of the *Faretta* decision:

> "There can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel. For it is surely true that the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial. And a strong argument can surely be made that the whole thrust of those decisions may inevitably lead to the conclusion that a State may constitutionally impose a lawyer upon even an unwilling defendant." (Citations and footnote omitted.)

Furthermore contrary to respondent's allegation, a constitutional right of self-representation has never been recognized in California before *Faretta*, as noted by the California Supreme Court in *People v. Windham,* 19 Cal.3d 121, 126; 133 Cal. Rptr. 8, 11; 560 P.2d 1187, 1190 (1977) *cert. denied,* 434 U.S. 848 (1977).

As such, the question of retroactivity of *Faretta* should have been reached. For the reasons set forth at pages 14-17 of the Petition for a Writ of Certiorari, it is urged that the *Faretta* doctrine should not be held retroactive.

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition, and the supplement thereto, petitioner submits that a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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